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BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *DBS Public Service Obligations, MM Docket No. 93-25*

Dear Mr. Caton:

Enclosed for filing on behalf of American Sky Broadcasting LLC is an original plus four (4) copies of Comments in the above-referenced proceeding.

Also enclosed is an extra copy to be stamped and returned with our messenger.

Very truly yours,

William M. Wiltshire

William M. Wiltshire

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
Direct Broadcast Satellite Public Service Obligations	)	

COMMENTS OF AMERICAN SKY BROADCASTING LLC

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April 28, 1997

SUMMARY

Section 25 of the 1992 Cable Act directs the Commission to adopt certain public service requirements for the Direct Broadcast Satellite ("DBS") service. American Sky Broadcasting LLC ("ASkyB") fully supports the efforts of Congress and the Commission to increase the amount of public service programming available as part of DBS services, and welcomes the opportunity to help shape the rules under which these efforts will be implemented. In general, ASkyB favors a continuation of the Commission's flexible and deregulatory approach to the DBS service as the best way to achieve the desire for public service programming without handicapping DBS providers unnecessarily and making them less competitive in the multichannel video programming distribution market.

ASkyB believes that the rules applicable to broadcast licensees requiring reasonable access and equal opportunities for qualified political programming and advertising offer a good starting point for similar rules in the DBS service, but that significant differences between broadcast and subscription services -- most importantly, the fact that DBS operators do not generally have control over the programming they offer or the sale of advertising time -- must be taken into account.

Section 25 also mandates that each DBS provider reserve from 4% to 7% of its channel capacity for noncommercial educational and informational programming. We believe that the Commission should establish an across-the-board set aside of 4% in light of the DBS industry's nascent state of development. The capacity to be reserved for this purpose must be determined using a methodology that reflects the fact that, unlike terrestrial services, not all DBS capacity is available for video service to all subscribers at all times. In addition, the Commission should

apply this requirement in a flexible manner, taking into consideration all of the unique aspects of DBS, in order to enable providers to offer a rich and varied line-up of public service programming.

We share the Commission's belief that application of the political access and equal opportunities principles, combined with the set aside of capacity for noncommercial educational and informational programming, should completely fulfill the congressional public service mandate, and thus that no other public interest requirements should be adopted at this time.

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COMMENTS OF AMERICAN SKY BROADCASTING LLC

In the Cable Television Consumer Protection and Competition Act of 1992, Congress directed the Commission to draft rules that will put the nation's Direct Broadcast Satellite ("DBS") resources to productive use by providing public service programming to the American public. American Sky Broadcasting LLC ("ASkyB") fully supports these efforts and welcomes the opportunity to provide the American public with high quality educational and informational television programming. ASkyB believes that the Commission must consider the broader effects of the rules it adopts on the multichannel video programming distribution ("MVPD") marketplace, especially the impact of such rules on the ability of DBS providers to compete with other MVPD operators. Recognizing the complicated and rapidly developing nature of the DBS industry, we submit these comments as an aid to the Commission in crafting rules that achieve Congress' public service goals in the most effective and practicable manner.

ASkyB is a venture between The News Corporation Limited ("News Corp.") and MCI Communications Corporation ("MCI") that is in the process of formation as a vehicle through

which to invest in a DBS programming service. ASkyB, News Corp., MCI, and EchoStar Communications Corporation ("EchoStar") plan a series of transactions under which the companies will combine their satellite-related assets and ASkyB will acquire a 49.9% interest in EchoStar, which currently provides DBS service through the integrated system of its subsidiaries.

BACKGROUND

Section 25 of the 1992 Cable Act, 47 U.S.C. § 335, is composed of two subsections. Subsection (a) requires the Commission to impose on DBS providers public interest or other requirements which must, at a minimum, apply to them the reasonable access requirements of Section 312(a)(7) and the use of facilities requirements of Section 315 of the Communications Act. This subsection also directs the Commission to examine opportunities for promoting the principles of localism. Subsection (b) of Section 25 directs the Commission to require that each DBS provider reserve from four to seven percent of its channel capacity exclusively for noncommercial programming of an educational or informational nature, and to establish rules for determining reasonable prices for providing access to such capacity for national educational program suppliers.

In 1993, the Commission initiated this rulemaking to carry out the statutory directives.[1] After the comment period had closed, the proceeding was effectively stayed when a Federal District Court held that portions of the 1992 Cable Act, including Section 25, were

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[1] Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations, 8 FCC Rcd. 1589 (1993)("*Public Service NPRM*").

unconstitutional.[2] In November 1996, the D.C. Circuit overturned that holding.[3] By Public Notice issued January 31, 1997, the Commission requested additional comments to refresh the record.[4]

In the four years since Section 25 was enacted, the DBS industry has undergone dramatic and dynamic change. At the time the Commission initiated this proceeding, not a single Part 100 DBS licensee had commenced operations, and the lone service provider operating from a satellite licensed under Part 25 -- Primestar Partners LP -- offered only eleven channels of programming.[5] Now there are five Part 100 licensees and two operators providing DBS service from Part 25 Ku-band satellites, offering hundreds of channels of digital-quality video programming to customers nationwide. In the last year, the United States has negotiated a DBS/DTH Protocol with Mexico laying the groundrules for cross-border service and has initiated a proceeding to adopt rules for service from other foreign-licensed satellites into the United States.[6] The Commission has also

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2 Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993).

3 Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996).

4 Public Notice, FCC 97-24 (Jan. 31, 1997). The Commission later extended the comment period to April 28. See Public Notice, DA 97-602 (March 21, 1997).

5 *Public Service NPRM*, 8 FCC Rcd. at 1590, 1592 n.14.

6 See Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States (Nov. 8, 1996)("*Mexican DBS/DTH Protocol*"); Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, FCC 96-210 (released May 14, 1996).

authorized U.S.-licensed satellites to provide international DBS service to other countries.[7] The continuing rapid development of DBS service will challenge the Commission in implementing the statutory mandates of Section 25 that were adopted in a different era. ASkyB had not even been conceived during the earlier stages of this proceeding, and it welcomes the opportunity to help shape the rules under which satellite-based MVPDs will provide American viewers with public service programming.

DISCUSSION

In order to ease the assimilation of these comments, the issues are discussed below in the order in which they were addressed in the *Public Service NPRM.*

A. Reasonable Access, Equal Opportunities, and Other Public Interest Requirements.

Congress has directed the Commission to impose public interest and other requirements on DBS providers. In particular, the Commission is to apply to the DBS service the Communications Act's requirements affecting political candidates applicable to broadcast licensees (codified in Section 312(a)(7)), and applicable to both broadcast licensees and cable system operators (codified in Section 315).

1. Reasonable Access

Section 312(a)(7) requires broadcast licensees to afford reasonable access to the use of the station by a legally qualified candidate for federal elective office on behalf of his candidacy, including permitting such candidates to purchase reasonable amounts of time. A broadcast

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[7] Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd. 2429 (1996)("*DISCO I*").

licensee is not allowed to exercise any editorial control over the candidate's use of the facilities. As noted in the *Public Service NPRM*, the Commission has a longstanding policy of "relying upon the reasonable, good faith judgments of [broadcast] licensees to provide reasonable access to federal candidates and determines compliance on a case-by-case basis."[8] ASkyB believes that the Commission should apply this policy to DBS providers as well.

In delineating the access requirement for DBS providers, however, the Commission should not import the broadcast rules wholesale without taking into account the differing characteristics of multichannel DBS service. In particular, the Commission should bear in mind that, *for the vast majority of channels they carry, DBS operators do not control programming selection or sales of advertising time*. As a rule, DBS operators do not create their own programming; rather, they aggregate and package channels of programming provided by other sources. Standard program carriage contracts forbid the alteration of the programming stream, including any commercials that stream may contain.[9] The Commission, therefore, should not impose access requirements beyond any channels over which the DBS operator controls sales of advertising or programming time. This approach would be consistent with the Commission's approach in the broadcast context, wherein a licensee is required to make time available to qualified federal candidates only

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[8] *Public Service NPRM*, 8 FCC Rcd. at 1593.

[9] In the relatively rare instance where a DBS provider has control over any commercial availabilities, that control is subject to significant contractual limitations. For example, a DBS provider may be allowed to cover the local commercial avails provided to the programmer's cable system affiliates with promotions for the DBS service itself, but cannot sell that time to third parties.

in the increments offered to commercial advertisers or in the lengths it ordinarily programs its station.[10] Where there is no such increment, there should be no corresponding obligation.

To the extent a DBS provider controls programming or advertising time, the Commission should require it to provide reasonable access to qualified federal candidates for *national* office -- *i.e.*, President and Vice President -- since those are the only races in which the nationwide coverage of DBS corresponds to the nationwide character of the election. Otherwise, it is conceivable that the hundreds of qualified candidates for federal offices around the country interested in using a DBS platform could overwhelm a DBS system. This would place DBS providers at a distinct competitive disadvantage, since no other MVPD is subject to a requirement similar to Section 312(a)(7). It would also result in a highly inefficient use of spectrum resources. In addition, to the extent a DBS service carries local broadcast stations -- as ASkyB and EchoStar intend to do -- its viewers will be exposed to the advertising time purchased by local federal candidates as part of the retransmitted signal.

While a DBS provider would be *required* to provide access only for Presidential and Vice Presidential candidates, it would not be precluded from offering time to all qualified federal candidates, as ASkyB intends to do.[11] In order to give DBS providers the flexibility necessary to meet their obligations under Section 312(a)(7), the Commission should allow them the option of

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[10] National Ass'n of Broadcasters, 9 FCC Rcd. 5778, 5779-80 (1994).

[11] As discussed more fully in Section B(3)(b), *infra*, programming supplied by qualifying political programmers should also count toward fulfillment of a DBS operator's obligation to set aside capacity for noncommercial programming.

placing all political advertising on one or more channels designated for and deidcated to that purpose.

2. Equal Opportunities

Section 315 provides that if a broadcast licensee permits any legally qualified candidate to use its station, the licensee must afford equal opportunities to all other such candidates for that office in the use of the station.[12] The statute further provides for a "lowest unit charge" rate to apply during specified periods immediately preceding a primary, general, or special election. In applying certain of these requirements to DBS providers, the Commission can draw on its experience with other MVPDs subject to the same mandates -- namely, cable operators. Like them, DBS providers should not be required to provide equal opportunities on the same channel or take into account the demographics of channels. Instead, they should be deemed to have satisfied their obligations so long as the channels used have audiences of comparable size.

While we agree in principle that political advertisers using a DBS system should pay only a lowest unit charge, application of the rules adopted for broadcast and cable is problematic for a purely subscription service that sells no advertising time. As discussed above, for virtually all channels it is the programmer, rather than the DBS provider, that sells commercial time. It is quite likely that the only advertising which the DBS operator does place will be political advertising required under Sections 312(a)(7) and 315. Under these circumstances, the concept

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[12] Both the statute and the Commission's implementing rule exempt bona fide newscasts, interviews, documentaries, and news events from these requirements. See 47 C.F.R. § 73.1941.

of a lowest unit charge becomes meaningless, except in the limited sense that all qualified candidates would be charged the same rate.

There is, however, one type of programming time that all DBS operators will be selling in the near future: the time reserved for noncommercial programming of an educational or informational nature. The 1992 Cable Act mandates that certain qualified providers of such programming are entitled to pay no more than 50% of the total direct costs of making such capacity available. The Commission could use this formula as a benchmark or proxy for calculating the lowest unit charge for political sales, as it is likely to be the lowest charge available to any programmer seeking access to a DBS system.

The *Public Service NPRM* correctly concludes that when a DBS operator retransmits the programming of a terrestrial broadcast television station the responsibility to ensure compliance with the political broadcasting requirements of Sections 312(a)(7) and 315 should be placed on the terrestrial broadcast station.[13] Such stations are already under the obligation to comply with these statutory mandates, and the retransmitting DBS provider is prohibited under the Commission's rules from altering the contents of the signal in retransmission. Retransmission of local stations will ensure that DBS subscribers have the same opportunities for exposure to local candidates as do viewers of broadcast television, which will also serve the congressionally-favored principle of localism.

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13 *Public Service NPRM*, 8 FCC Rcd. at 1593 n.21.

3. Other Public Interest Obligations

We share the Commission's belief that applying Sections 312(a)(7) and 315, combined with the set aside of capacity for noncommercial educational and informational programming, should completely fulfill the congressional mandate,[14] and thus that no other public interest requirements should be adopted at this time. This approach is also consistent with the Commission's long-sought goal of promoting DBS as an effective alternative to cable, since the imposition of excessive regulation might undermine that goal. Despite its recent gains in subscribership, DBS remains a nascent service to which the Commission should continue to apply minimal and flexible regulation. Many factors, including advances in compression and spot beam technology and the impact of foreign-licensed satellites, are likely to change the nature of the service over the next few years. It is very difficult to predict at this early stage in the development of the DBS service what impact the public service rules adopted in this proceeding will have. In these circumstances, the Commission should, consistent with its flexible approach to DBS regulation, impose no further obligations at this time. As the industry matures, the Commission will have ample opportunity to reassess this decision and adopt a different approach if appropriate in light of future developments.

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[14] Id. at 1595.

B. Carriage Obligations for Noncommercial Programming of an Educational or Informational Nature.

1. Definition of "Channel Capacity"

Section 25(b) requires the reservation of DBS "channel capacity" for noncommercial programming of an educational or informational nature, but nowhere defines the term "channel" or "capacity." While this would not present a problem in many video services, the common use of digital compression in the DBS service and technological characteristics of a satellite-delivered medium make the terms susceptible to a number of different interpretations. In addition, the number of simultaneous services that can be transmitted over the same bandwidth in a digital format varies depending on the type of information delivered and the picture quality the operator desires. Moreover, even these factors are unstable, as digital technologies continue to evolve at a rapid pace.

At the time the Commission issued the *Public Service NPRM*, it had never before considered how best to quantify channel capacity in a digital, multichannel environment. Last year, however, a similar issue arose in defining digital capacity for purposes of regulating open video systems ("OVS"), another MVPD service created as part of the Telecommunications Act of 1996. The Commission concluded that *bandwidth* should be used to measure capacity available on the digital portion of an OVS system.[15] A similar approach may be appropriate for the DBS service as well, since a methodology based on bandwidth, if appropriately tailored, could be able

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[15] Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, *Second Report and Order*, FCC 96-249 at ¶ 60 (released June 3, 1996).

to harness the dynamism of the service by automatically increasing the public service programming available as advances in compression technologies makes a given bandwidth capable of delivering more programming.

The use of bandwidth as a measure of DBS capacity would require some important modifications to account for the difference between terrestrial wireline systems and satellite delivery systems. All of the capacity of a wireline system such as OVS is available to a subscriber at all times. That is not, however, always the case for satellite systems. The following cases illustrate this point:

- Full-CONUS vs. Half-CONUS: The Commission originally anticipated that Part 100 DBS operators would provide service to the entire U.S. by beaming essentially the same programming from channels on two different satellites each of which covered half the country. Subsequent technological advances have enabled operators to provide full-CONUS service from three of the eight orbital locations available for Part 100 service. It would be unfair for a DBS service offering 60 channels of programming to the eastern half of the U.S. from one satellite and 60 channels of duplicative programming to the western half of the U.S. from another satellite to be deemed to have twice the capacity -- and therefore twice the required set aside obligation -- as a DBS service offering 60 channels of programming to the entire country from one full-CONUS orbital location. Such a double count would further disadvantage those operators providing service using half-CONUS channels. It would also discourage innovative services to regions or localities within the country.

- International Service: The Commission has also authorized U.S.-licensed satellites to provide service to other countries without seeking any further regulatory approval.[16] To the extent a DBS provider dedicates capacity to service solely in a foreign country, that capacity should not be part of the set aside calculation. Conversely, a DBS provider offering service in the U.S. from a foreign-licensed satellite should only incur public

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16 *DISCO I*, 11 FCC Rcd. at 2439.

service obligations commensurate with the bandwidth available for service to American subscribers.[17]

- Alternative Use: Part 25 licensees are under no obligation to use any of their capacity to provide DBS service. In addition, the Commission has authorized Part 100 DBS licensees to make unrestricted use of their capacity during the first five years of their license term, and thereafter to use up to one half of their capacity for non-DBS service.[18] To the extent a DBS provider is not using its capacity to provide DBS service, that capacity should not be included in the amount available for noncommercial programming. This would accord equivalent treatment to satellite capacity used for non-DBS service on both Part 25 and Part 100 satellites, since in neither case would capacity not used for direct-to-home video be considered in the set aside requirement.

In each of these examples, some of the DBS provider's capacity is not available to a given DBS subscriber -- a fact that, in fairness, must be taken into account in the methodology for the capacity set aside calculation.

Section 25 refers to a DBS provider offering video programming. Most DBS providers, however, also offer subscribers digital quality audio channels. In its recent Report and Order establishing rules and policies for the Digital Audio Radio Satellite Service ("DARS"), the Commission decided not to impose a set aside of capacity for noncommercial educational and informational programming, but reserved the right to adopt additional public interest obligations for DARS in the future if warranted.[19] The audio-only services provided from DBS satellites are

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[17] Such a provider may also have public service obligations on the bandwidth used to provide service in other countries, making a double count particularly onerous.

[18] DBS Rules Order, 11 FCC Rcd. at 9718.

[19] Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, FCC 97-70 at ¶ 93 (March 3, 1997). The Commission did apply the federal candidate access provisions of Section 312(a)(7) and the equal opportunities provision of Section 315 to DARS licensees. Id. at ¶ 92.

indistinguishable from DARS service. In fairness, a public service set aside should not apply to capacity used for the former if it does not apply to the latter. Accordingly, unless and until such a set aside is adopted for DARS, capacity used for DBS audio-only services should be excluded from the set aside calculation.

2. Amount of Channel Capacity to be Set Aside

Section 25 requires that DBS providers reserve from 4% to 7% of their capacity for qualifying noncommercial programming. Both the Commission and the Supreme Court have recognized the Communications Act's general preference for regulatory policies that enhance rather than impede the exercise of a licensee's editorial discretion.[20] In addition, the Commission has traditionally elected to impose the minimum amount of regulation possible during the nascent stages of the DBS service.[21] In spite of its success, DBS remains in its infancy and the final contours of the service cannot yet be known. Moreover, it has an uphill battle against the entrenched dominant provider of multichannel video programming -- the cable industry -- which does not have this set aside obligation. Under these circumstances, the Commission should continue to regulate lightly in this area. Accordingly, the Commission should limit the number of channels over which DBS operators have no editorial discretion to the minimum number necessary to serve the statutory purpose.

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20 Subscription Video Services, 2 FCC Rcd. 1001, 1005 (1987)(citing CBS v. Democratic Nat'l Committee, 412 U.S. 94 (1973)), aff'd sub nom. National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

21 See, e.g., Direct Broadcast Satellite Report and Order, 90 FCC Rcd. 676, 706 (1982)(public interest would be served by utilizing flexible regulatory approach for DBS and imposing minimal regulatory requirements consistent with statutory provisions and international agreements). DIRECTV, the DBS industry leader, launched its first satellite less than three years ago, and four other DBS permittees have yet to launch their first satellite.

For the time being, then, the Commission should require an across-the-board set aside of 4% of channel capacity for qualifying noncommercial programming. To the extent a DBS provider acquires additional capacity either through launch of additional satellites or transfer of control over a license, the set aside should apply to the new capacity a reasonable period (perhaps 180 days) after the triggering event.

In order to avoid requiring the reservation of partial of channels, the Commission proposed using a sliding scale so that systems falling into certain capacity categories would be required to reserve a specific number of channels.[22] However, if bandwidth is used as a measure of capacity, differences in compression techniques would result in different channeling capabilities. Thus, any sliding scale adopted by the Commission would arbitrarily either understate or overstate the number of channels a given provider could fit into the bandwidth set aside. Instead, the Commission should leave to each DBS provider the responsibility for determining in good faith how best to configure program offerings to fill the channel capacity set aside for noncommercial programming.

In the OVS context, the Commission found that it would be reasonable for operators to require video programmers to request carriage in no less than one-channel increments.[23] In keeping with the Commission's flexible approach to the DBS service, DBS providers should be allowed (though not required) to impose the same requirement, but should also have the ability to

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22 *Public Service NPRM*, 8 FCC Rcd. at 1597.

23 *OVS Order* at ¶ 85.

satisfy the set aside requirement by reserving an equivalent capacity in fractional channels for qualifying noncommercial programming.

3. Qualifying Noncommercial Programming

Section 25 provides that the set aside channel capacity be reserved exclusively for "noncommercial programming of an educational or informational nature." The statute also provides that DBS providers shall meet the required set aside by making channel capacity available to "national educational programming suppliers." Accordingly, the statute has established a two-track regime for satisfying the set aside requirement, identifying both a category of programming to be carried over the reserved capacity without regard to the programmer's identity, as well as a category of programmers to be given non-exclusive access to that capacity. Since the statute does not explicitly delimit either category, however, the Commission must define both terms.

a. Definition of Noncommercial Educational or Informational Programming

The definition of "noncommercial programming of an educational or informational nature" should be derived in large measure from the elements of the phrase itself. Noncommercial programming is not funded by advertising revenue and does not have profit as its primary aim. Programming that educates the viewer strives to further the process of learning and instruction, while informational programming provides facts, covers current events, and presents other data to the viewer that can help him to better understand and appreciate the world. The subject matter of such programming -- which would include art, science, culture, government, business, literature, world affairs, history, economics, philosophy, medicine, etc. -- is so varied as to defy an exhaustive list. Accordingly, the Commission should define this programming in terms of its goals

rather than its subjects. The Commission took a similiar approach in defining educational and informational programming for children as "any television programming that furthers the educational and informational needs of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs."[24] Such an approach would be appropriate in this context as well.

b. Definition of "National Educational Programming Supplier"

Section 25 defines the term "national educational programming supplier" to include any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions.[25] While the statute does not provide a definition of those illustrative entities, the *Public Service NPRM* correctly recognizes that Part IV of Title III of the Communications Act provides definitions of similar entities that should guide the Commission's consideration. Like Section 25, Part IV was enacted in part to "[e]ncourage the growth and development of nonbroadcast telecommunications technologies for the delivery of noncommercial educational and cultural radio and television programs, and other related noncommercial informational and instructional services to the public."[26] As noted in the *Public Service NPRM*, Section 397 of the Act uses many similar terms in providing for matching grants to help fund construction of public telecommunications facilities. In particular, Section 397

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[24] 47 C.F.R. § 73.671(c).

[25] 47 U.S.C. § 335(b)(5)(B).

[26] H.R. Rep. No. 1178, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5345 ("House Report").

defines the following terms in a manner appropriate to the goals of the DBS capacity set aside of Section 25.

> *Noncommercial educational broadcast station:* a television or radio broadcast station which (A) under the rules and regulations of the Commission is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.[27]
>
> *Public telecommunications entity:* any enterprise which is a public broadcast station or a noncommercial telecommunications entity and disseminates public telecommunications services to the public.[28]
>
> *Noncommercial telecommunications entity:* any enterprise which is owned and operated by a State, a political or special purpose subdivision of a State, a public agency, or a nonprofit private foundation, corporation or association; and has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station.[29]
>
> *Public telecommunications services:* noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronic communications.[30]

As for public or private educational institutions, as the *Public Service NPRM* notes, the Commission has defined a similar concept in establishing the eligibility criteria for licensees in the Instructional Television Fixed Service ("ITFS"). The Commission will grant ITFS licenses only to

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27 47 U.S.C. § 397(6).

28 Id. at § 397(12).

29 Id. at § 397(7).

30 Id. at § 397(14).

accredited educational institutions, governmental organizations engaged in the formal education of enrolled students, or nonprofit organizations whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.[31] ASkyB believes that these criteria are also relevant here.

The *Public Service NPRM* implies, and ASkyB agrees, that the statutory definitions of Section 397, coupled with the ITFS eligibility criteria, provide adequate and appropriate guidelines for purposes of Section 25. The Commission should adopt these definitions or else adapt them only slightly if necessary. For example, we agree with the Commission's view that the term "public telecommunications entity" should encompass not only public television licensees but also entities such as the Public Broadcasting Service and the Corporation for Public Broadcasting that disseminate programming on a national basis to public television stations.[32] Overall, however, the definitions discussed above provide an appropriate framework with which to implement Section 25.

In addition, ASkyB strongly believes that the Commission should explicitly rule that the term "noncommercial telecommunications entity" can include political parties, candidates for federal office, and other non-profit groups to the extent they sponsor debates or discussions among federal candidates or representatives of national political parties or about topical issues of national importance. Specific inclusion of these groups as qualifying programmers will set the stage for the DBS service to enhance the national political debate by providing them access at

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31 47 C.F.R. § 74.932(a).

32 See *Public Service NPRM*, 8 FCC Rcd at 1597.

reduced prices. In order to ensure that this type of programming does not crowd out other types of noncommercial educational and informational programming, however, we propose that the Commission limit noncommercial political programming to 1% of a DBS provider's total capacity (*i.e.*, one-quarter of the 4% capacity set aside).

4. Mechanics for Fulfilling Set Aside Requirement.

DBS providers should be given maximum flexibility in fulfilling the requirement for noncommercial, educational/informational programming. For example, a provider should be free to fulfill its set aside requirement with any programming and/or programmer that fits the statutory qualifications, including established programming such as that provided by PBS, C-SPAN, and The Learning Channel. We believe, however, that in order to promote the production of additional qualifying programming, providers should be allowed to devote no more than than half of set aside capacity to such existing services. And, as discussed above, a DBS provider should be able to satisfy up to one quarter of its set aside obligation by making channel capacity available to qualifying noncommercial political programmers. In addition, although DBS providers are to have no editorial control over the content of the set aside programming,[33] they should be entrusted with the discretion to determine the appropriate mix of programming that will enable them to present an integrated line-up that maximizes program quality and diversity while also attracting the greatest amount of consumer interest. A flexible approach is the best way to ensure the production and distribution of a diverse range of public service programming.

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[33] We agree with the *Public Service NPRM's* tentative conclusion that since DBS providers will not exercise editorial control over the programming mandated by Section 25, those providers should be shielded from liability for harm or violations arising from such programming. Id.

The mechanism for identifying qualifying programming could take essentially three different forms, none of which is exclusive of the others. First, operators should be free to make their own reasonable, good faith determinations of qualification just as the Commission has traditionally allowed broadcasters to do in complying with a variety of public service requirements, including educational/informational programming for children, political broadcasting requirements, and providing programming that is responsive to community needs.[34] Second, representatives of the DBS industry could establish an independent, non-profit clearinghouse that would evaluate programming and render determinations upon which all providers would be entitled to rely. In combination, these approaches will allow DBS providers the option to draw from a pre-cleared pool of programming without preventing them from dedicating capacity to unique or differentiated educational and informational programming.

The statutory language also seems to contemplate a third approach similar to the commercial leased access model applicable to cable television operators. Operators of cable systems with more than 36 channels are required to set aside between ten and fifteen percent of their channels for commercial use by persons unaffiliated with the operator, with the set aside requirement proportional to a system's total activated channel capacity.[35] This requirement was imposed in order to assure access to cable systems by unaffiliated third parties who have a desire to distribute video programming free of the editorial control of the cable operator. The DBS capacity set aside differs from the cable leased access regime in that (1) it aims at increasing the

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[34] See, e.g., Report and Order in MM Docket No. 91-168, 7 FCC Rcd. 678, 680-81 (1991).

[35] 47 U.S.C. §§ 76.970(a), 532(b)(1).